IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS
William C. Whitbeck, Presiding Judge

MARY BAILEY

Plaintiff/Appellee, **Docket No. 125110**

v

OAKWOOD HOSPITAL AND MEDICAL CENTER

Defendant/Appellant,

and

SECOND INJURY FUND

Defendant/Appellee,

and

DIRECTOR OF THE BUREAU OF WORKERS' AND UNEMPLOYMENT COMPENSATION

Intervenor/Appellee.

==========

BRIEF ON APPEAL - APPELLANT

ORAL ARGUMENT REQUESTED

HUMPHREY, HANNON, MORIARITY & SCHOENER, P.C
ROBERT J. HUMPHREY P31540
JOHN L. RUEDISUELI P41164
Attorney for Appellant
3201 University Drive Suite 150
Auburn Hills, MI 48326
248-409-9000

TABLE OF CONTENTS

INDEX OF AUTHORITIES

STATEMENT OF THE BASIS FOR THE JURISDICTION OF THE COURT

The Court has jurisdiction to review the opinion entered by the Court of Appeals in the matter of **Bailey v Oakwood Hosp and Medical Center**, 259 Mich App 298, 674 NW2d 160 (2003) by authority of **MCL 418.861a (14). Mudel v. Great Atlantic & Pacific Tea Co.,** 462 Mich 694, 614 NW2d 607(2000).

STATEMENT OF QUESTIONS PRESENTED

I. WHETHER IT WAS ERRONEOUS TO DISMISS THE SECOND INJURY FUND AND CONTINUE THE LIABILITY OF THE EMPLOYER PURSUANT TO *ROBINSON V GENERAL MOTORS CORP* AND SECTIONS 921 AND 925 OF THE WORKERS' COMPENSATION ACT?

Plaintiff/Appellee answers "NO."
Defendant/Appellant answers "YES."
Defendant/Appellee Fund answers "NO."
Intervenor/Appellee Director answers "NO."
Amicus curiae Munson answers "YES."
Court of Appeals answered "NO."
Workers Comp. App. Comm. answers "YES."
Board of Magistrates answered "NO."

II. WHETHER APPLYING SECTION 921 REQUIRES ENDING LIABILITY OF THE EMPLOYER 52 WEEKS AFTER THE INJURY?

Plaintiff/Appellee answers "NO."
Defendant/Appellant answers "YES."
Defendant/Appellee Fund answers "NO."
Intervenor/Appellee Director answers "NO."
Amicus curiae Munson answers "YES."
Court of Appeals answered "NO."
Workers Comp. App. Comm. answered "YES."
Board of Magistrates answered "NO."

STATEMENT OF FACTS

SUBSTANTIVE FACTS

Plaintiff began trial by apologizing to Defense Counsel for death threats directed at him and other representatives of Defendant. Plaintiff was 54 years old at the time. She began working for Defendant in March of 1989 (16A).

Plaintiff's employment file contains a pre-employment request for a Vocational Handicap Certificate, Vocational Certificate Form, radiology report, and certificate card. It further contained certification that the forms were properly sent to the Michigan Department of Education, signed and received. The Department of Education never responded to Defendant's subpoena for its complete records (21A,22A).

At trial, Plaintiff denied being Certified Vocationally Handicapped. She said the signature on the Application "looks similar to my signature," however; she would not have signed it without "wanting to know why in the world I was signing such a form". She recalled filling out the Pre-Employment Questionnaire, and having a pre-employment physical, including spine x-rays (21A,22A). It should be noted that at this stage of the appeal, the validity of the certification is a final factual determination and not an issue.

Plaintiff's job at Defendant as a medical secretary transcriptionist required her to transcribe doctors' notes, utilizing a Dictaphone. This required her to use her foot and hands (16a).

In approximately September of 1993, Plaintiff began experiencing hand complaints. She had right carpal tunnel release December 1993, and left carpal tunnel release in January 1994. She then returned to regular work in February of 1994 (17a).

Shortly thereafter, Plaintiff experienced recurrence of hand symptoms. She last worked at Defendant in September of 1994 (17a).

A Vocational Rehabilitation Case Manager, Ms. Dee Tyler, was assigned to Plaintiff to assist her in obtaining gainful employment in October of 1996. In early 1998, Plaintiff agreed to follow a rehabilitation plan. She ultimately failed to do so. Her voluntary weekly workers' compensation benefits were disputed at that time (17a).

PROCEDURAL FACTS

The underlying claim involves an alleged specific injury on December 15, 1993 and a last day of work of September 21, 1994. Plaintiff's undated Application for Hearing, Form A was filed sometime prior to July 6, 1998, the date Lansing sent

out a Notice of Hearing. Workers' Compensation benefits had been voluntarily accepted by the Defendant and disputed March 20, 1998 over "work avoidance issues." (17a)

Defendant filed responsive pleadings on August 10, 1998. Upon discovering Plaintiff's Vocationally Handicapped Worker's Certificate, Defendant filed an Application for Hearing, Form C on November 12, 1998. The Bureau approved form indicated that Defendant sought to add the involvement of the Second Injury Fund, Vocationally Handicap Provision in accordance with Chapter Nine of the Workers' Compensation Act. That Application was processed and served by Lansing February 3, 1999. (2a)

The "Fund" directed a letter to Defense counsel on January 21, 1999 under signature of Program Specialist, Mr. Noel Todter. In that letter, Mr. Todter acknowledged receipt of Defendant's, "letter/motion" (emphasis added) placing the Fund on notice of the claim. The letter goes on to deny, "any liability in this case at this time". It then simply states that an investigation is under way to determine if the certification is proper, and that upon completion of that investigation, the Fund will formally advise as to whether the certification is proper.

The Fund then retained counsel. The parties began to

prepare issues in dispute for trial. Counsel for the Fund began what can only be characterized as exhaustive investigative efforts. The Fund wanted to review Defendant's file. The Fund wanted to arrange a meeting to review it. Then, the Fund requested voluminous copies that were provided. The Fund questioned a potential Defendant name change that after research was explained. (21a)

While all of this was going on, the matter of **Robinson v General Motors Corp.,** 242 Mich App 331, 619 NW2d 411 (2000) [lv den MI Sup. Ct. 117684 2/26/01] was decided October 15, 1998. Therein, the Appellate Commission Granted the Fund's Motion to Dismiss based on a Notice issue. Clearly, the Fund knew of the ruling as of the date of Defendant's Form C.

Six months later, only after what could best be termed a fruitless fishing expedition, the attorney for the Fund filed a Motion to Dismiss its involvement, on the seemingly suddenly surfaced ground that the MCL 418.925(1) Notice provision was not complied with. (2a)

Defendant filed a response to the Fund's Motion August 3, 1999. Plaintiff had essentially taken no position in the "Fund Issue" one-way or the other. Magistrate G. Jay Quist entertained oral argument on September 21, 1999. (2a)

In a decision mailed October 4, 1999, the Magistrate

granted the Fund's motion to dismiss (1a,2a). He relied upon sections 925 and 931. He also relied upon the decision of **Robinson v General Motors Corp.,** supra.

Defendant filed a timely Claim for Review with the Appellate Commission. In an Opinion and Order dated May 26, 2000, the Appellate Commission went to great lengths to analyze Sections 925 and 931, particularly with regard to the alleged notice requirements, which the Fund cites when motioning for dismissal from this action. The Commission correctly pointed out that the previous decision in **Robinson** supra, and the Magistrate's original decision in our case failed to address the liability mandates of Chapter IX, specifically contained in Section 921. Noting that the notice provision of the statute did not "create liability," the Commission distinguished between allegedly fatally defective notice and notice which may not comply with the strict pronouncement of the statute, but, in any event, does not effect the specifically limited liability of the Defendant and ultimate liability of the Fund. The Commission further distinguished between contested liability and claims that have been voluntarily accepted by the primary Defendant. In its Opinion and Order, the Magistrate was reversed and the matter was remanded, "for the Magistrate [to] join the Fund as a

party." (6a,7a)

The parties then again appeared before the Magistrate to submit evidence and proofs, as, at the time of the parties last meeting, proceedings were limited to the Fund's Motion for Dismissal. In light of the stipulations given by the parties, the issues were essentially limited to the propriety of the Fund's involvement and work avoidance issues, the basis for the initial dispute in March of 1998, referenced above. In an Opinion and Order mailed February 5, 2001, Magistrate Quist again dismissed the Fund's involvement for alleged failure to provide proper notice, relying on **Robinson** supra (13a,14a).

Defendant again sought timely Claim for Review with the Appellate Commission. In a decision mailed July 18, 2002, the Commission continues to offer that the Court of Appeals decision in **Robinson v General Motors Corp** does not completely contemplate the ramifications of its holding. There are myriad possible fact specific situations that may exist in cases involving injuries to workers Certified as Vocationally Handicapped. The Commission specifically finds absent in **Robinson** a comprehensive discussion of, "the liability of both the Second Injury Fund and employers when a vocationally handicapped employee is injured".

The Commission goes on to offer its analysis of such a setting, and then arrives at its opinions and conclusions utilizing the **Robinson** rationale. The Commission concluded, as did the Court of Appeals in our case, that although it disagreed with the **Robinson** rationale on the specific issue of dismissal of the Fund's involvement, it was constrained to follow it. It then addressed the statute's limitation of the Defendant's liability. It concluded that in addition to dismissal of the Second Injury Fund's involvement, the Magistrate's decision should be modified to reflect the statutory limit on the Defendant's liability that have already been satisfied. No further benefits are, therefore, owed by the Defendant in this matter following the plain meaning of Section 418.921 and **Robinson** (25a,26a).

Plaintiff then sought Leave to Appeal in the Court of Appeals. In an Order dated November 14, 2002, the Court granted leave (33a). Defendant filed a timely brief.

Oral argument was heard in the Court of Appeals on October 16, 2003. In a decision dated November 6, 2003, the Court of Appeals reversed the decision of the Appellate Commission, finding additional benefits the liability of the Defendant (34a,39a). In that decision, Chief Judge Whitbeck wrote a concurring opinion to highlight that his decision was

written pursuant to the doctrine of *stare decisis* and being **"precedentially bound" to shield the Second Injury Fund, "even in the face of the absolute silence of the third sentence in Section 921 statute as to such a shield"** (emphasis added). He further indicated that the court could not avoid imposing additional liability of the Defendant, **"even in the face of the absolute silence in the second sentence of Section 921 as to such an imposition"** (emphasis added). Judge Whitbeck concluded, "I am not persuaded by the obvious fairness of such a result", and additionally wrote in pertinent part:

> I must admit that I am not overly enamored of the reasoning in *Robinson* and in *Valencic*. The *Robinson* panel noted, accurately, that Section 925(1) is "silent regarding the consequences of an employer's failure to give notice to the fund during the period prescribed by the statute." Despite this lack of any statutory language spelling out the consequences to the Second Injury Fund of such an employer failure to give notice, the *Robinson* panel concluded that there should be *some* consequences because, were there not, "employers would be free to ignore the statutory requirements without fear of adverse consequences." **In my view, the *Robinson* panel thereby took upon itself the role of a super-legislature, stepping into a breach created by the silence of the statute itself in order to avoid a hypothetically undesirable result. I do not view this as the proper function of an appellate court; we do not, or ought not, function as black-robed nannies who tidy up the language of the law in the name of 'fairness.' Similarly, when the *Valencic* panel used the *Robinson* holding to cut off the liability of the Second Injury Fund, it was quite simply inventing a remedy nowhere**

provided for in the statute itself." (emphasis added)

ARGUMENT

I

IT WAS ERRONEOUS TO DISMISS THE SECOND INJURY FUND AND CONTINUE THE LIABILITY OF THE EMPLOYER PURSUANT TO *ROBINSON V. GEN MOTORS CORP* AND SECTIONS 921 AND 925 OF THE WORKERS' DISABILITY COMPENSATION ACT OF 1969

The Court of Appeals in this case relied heavily on **Robinson v General Motors Corp.,** 242 Mich App 331, 619 NW2d 411 (2000) as followed by **Valencic v TPM, Inc,** 248 Mich App 601; 639 NW2d 846 (2001) to hold that the Fund had no liability. In **Robinson**, **supra**, the Magistrate found the Fund's Motion for dismissal premature without a full hearing on the merits. He also found that the relief sought by the Fund appeared to be extreme and punitive, especially in light of a statute that provides no penalties for alleged failure to comply with its provisions and therefore denied the Fund's Motion for Dismissal.

On appeal by the Fund in **Robinson,** *supra*, the Appellate Commission held, as did the Court of Appeals in this case, that the statute's language need only be applied. It reversed the Magistrate and found the Fund free of liability. However, the Appellate Commission in its order of remand in this case distinguished ***Robinson***, *supra* by stressing the difference

between what triggers and creates liability of the Defendant and Fund.

Defendant adopts the distinction. It will be discussed more fully in Argument II. At this point, Defendant highlights why the Court of Appeals' decision is erroneous and results in material injustice.

Initially, this Court requested the parties to address use of the words "employer" and "carrier" within the statute, and whether their use affects the analysis. The words as used in Chapter Six, Security for Compensation are interchangeable as for the following reasons.

Section 601(c) states that, "whenever used in this act: 'carrier' means a self-insurer". Subsections (a) and (b) of section 601 define self-insurer and insurer to include, "an individual employer authorized to carry its own risk". **MCL 418.601** Since specifically addressed and defined by the statute, common and approved usage of language on the issue cannot apply. **People v Denio**, 454 Mich 691, 564 NW2d 13 (1997). In our case, the employer is self-insured. Therefore, "carrier" as used in section 925 does not conflict with "employer" as used in section 921.

Section 925

It remained legally erroneous for the Magistrate and

Court of Appeals to again justify dismissal of the Fund in reliance upon Section 925. This section provides in pertinent part:

> Not less than 90 nor more than 150 days before the expiration of 52 weeks after the date of injury, the carrier shall notify the fund whether it is likely that compensation may be payable beyond a period of 52 weeks after the date of injury.

The Statute provides what may be termed a "window". This is not a statute of limitations. Indeed, the closest the Act comes to a statute of limitations is Section 381, Claim for Compensation. **MCL 418.381(1)**

The section provides no statutory sanction. There is no precatory penalty for failure of an employer to notify the Fund within the "window". There is no reward for fulfilling the requirement to notify the Fund either. Judge Whitbeck highlights his concern regarding this absence of statutory support for arriving at the conclusion that the Fund has no liability in the concurring opinion.

What is more, the section requires not so much actual conduct but instead expression of an opinion or forecast of what might be, what may be or what appears to be. For example, assume an employer provided notice to the Fund on the

151st day *prior* to expiration of the 52 weeks post-injury. Would the Fund be dismissed from such an action? If we interpret the section as the Magistrate and the Court of Appeals did, then the answer would be, "yes". Such a result, of course, would be as erroneous as the Fund's dismissal in the case at bar.

Additional incongruity can be envisioned. What if notice was provided one day late on the 89th day before expiration of the 52-week period following an injury? Under the Magistrate's and Court of Appeals' interpretation of section 925, the Fund would have to be dismissed. And yet, what possible argument could be made for the appropriateness, or as Judge Whitbeck commented upon the lack of fairness of such a result?

What if the employee continues to work for one day or one week following the injury date? Is the "window" accordingly extended by that day or week? What if the employee continues to work for eight months after a date of injury, or nine or ten months, or 52 or 53 weeks after the injury and only then experiences lost time? What if the lost time is not for a continuous 52 weeks? What if two years goes by before there is lost time, keeping in mind that "disability" is defined in our state, not by some triggering event of injury, but instead

by diminished or lost ability to earn maximum wages. **MCL 418.301(4)** and **Sington v Chrysler Corp.**, 467 Mich 144, 648 NW2d 624 (2002).

To strictly interpret and apply this statute creates the potential for absurd and confusing results, something that was never envisioned by the Legislature nor remedied by the Statute's content. And it should be noted that although this writer knows of cases in the past where the statute has not been literally followed, the Fund took no similar position. The Fund therefore appears to be creating an even more unpredictable climate within which employers must operate.

What is more, Section 925 contains language that suggests that is it a guideline, intended to ensure smooth transition of file handling from the employer to the Fund as opposed to a statute of limitations. Use of words and phrases like, "it is likely" and "may be payable", as well as the underlying premise that the employee suffered a compensable injury are indicative that the spirit and intent of the provision is for guidance as opposed to punishment. The "window" cannot be applied to punish an employer by imposing additional liability when the certificate may be misplaced or perhaps lost, for instance.

Subsection (2) of 925 envisions scenarios where a carrier

may have to pay if the Fund feels a dispute is appropriate, and that the dispute will be resolved by a determination of the controversy. Again, this can be interpreted as further indication that dismissal of the Fund on alleged procedural grounds was inappropriate in this matter. Likewise, subsection (3) envisions that an employer might need to establish right of reimbursement before obtaining repayment. This also can be interpreted as further indication that dismissal of the Fund on alleged procedural issues was inappropriate in this matter.

Defendant has been prejudiced by this erroneous interpretation and application of the provisions of Chapter Nine. The Defendant relied upon its knowledge that when it hired your plaintiff, if she ever had any compensable injury whatsoever, it could avail itself to Chapter Nine, capping its exposure to the first 52 weeks. It has relied detrimentally upon this representation, a representation that was made when the Michigan Rehabilitative Services issued the Plaintiff's Certificate and wallet card in March of 1989. For the Fund to come forward ten years later and ask for an escape of all liability is abhorrent.

There can never be prejudice to the Fund for the Defendant's failure to give notice within the window, before

the window opens or after the window closes. The Defendant is by definition in the same shoes as the Fund, wanting to minimize or eliminate exposure. The Defendant's filing an Application for Mediation or Hearing for non-cooperation with Vocational Rehabilitative efforts proves this. The Defendant handled the claim in the same aggressive manner as the Fund has said it would have after the 52nd week.

Therefore, it was legally erroneous for the Magistrate and Court of Appeals to dismiss the Fund. There is not one scintilla of evidence of prejudice to the Fund.

The Fund may always have the limit of its liability from applying **MCL 418.381(2)** and **MCL 418.833(1)** which are commonly known as the "Back Rules" that if applicable diminish the Defendant's right to reimbursement. However, at least as of the date of the filing of Defendant's Form C forward, liability if any belongs to the Fund.

Another provision of Chapter Nine, Section 931 should be considered. It contains the vehicle provided for securing the involvement of the Fund. It provides that the Defendant must file a, "motion made in writing".

However, as mentioned above, the Application for Hearing, Form C, the Bureau-approved form utilized by the Defendant to secure the involvement of the Fund is the accepted vehicle.

To this writer's knowledge, it has been the accepted practice of the Board and practicing members for years if not decades.

Since the Magistrate did not cite Section 931 in his Decision on Remand, and the Court of Appeals did not rely upon it in its decision, that issue appears to have been put to rest at this stage of the Appeal. However, it is mentioned at this point as additional background regarding application and interpretation of Chapter Nine for the Court.

Chief Judge Whitbeck wrote a concurring opinion to highlight that his decision was written pursuant to the doctrine of *stare decisis* and being "precedentially bound" to shield the Second Injury Fund, "even in the face of the **absolute silence** of the third sentence in Section 921 statute **as to such a shield**" (emphasis added). He further indicated that the Court of Appeals could not avoid imposing additional liability of the Defendant, "even in the face of the **absolute silence** in the second sentence of Section 921 **as to such an imposition"** (emphasis added). Judge Whitbeck concluded, "I am not persuaded by the obvious fairness of such a result", and additionally wrote in pertinent part:

> I must admit that I am not overly enamored of the reasoning in *Robinson* and in *Valencic*. The *Robinson* panel noted, accurately, that Section 925(1) is "silent regarding the consequences of an employer's failure to give notice to the fund during the period prescribed by the statute." Despite this lack of

> any statutory language spelling out the consequences to the Second Injury Fund of such an employer failure to give notice, the *Robinson* panel concluded that there should be *some* consequences because, were there not, "employers would be free to ignore the statutory requirements without fear of adverse consequences." **In my view, the *Robinson* panel thereby took upon itself the role of a super-legislature, stepping into a breach created by the silence of the statute itself in order to avoid a hypothetically undesirable result. I do not view this as the proper function of an appellate court; we don not, or ought not, function as black-robed nannies who tidy up the language of the law in the name of 'fairness.' Similarly, when the *Valencic* panel used the *Robinson* holding to cut off the liability of the Second Injury Fund, it was quite simply inventing a remedy nowhere provided for in the statute itself."** (emphasis added)

Under the circumstances, the decisions of the Magistrate and Court of Appeals result in material injustice, and their like application will continue other similar results. It is clear based on the writings of Chief Judge Whitbeck that the decision is of major significance to the state's jurisprudence. The decision is legally erroneous in that it results in judicial legislation, something that is unacceptable. For these reasons, the decisions of the Magistrate and Court of Appeals should be reversed, and the Defendant should be afforded all relief to which it is entitled.

II

APPLYING SECTION 921 REQUIRES ENDING LIABILITY OF THE EMPLOYER 52 WEEKS AFTER THE INJURY

The Court of Appeals in the concurring opinion of Judge Whitbeck acknowledges the statute's termination of the Defendant's liability with use of the word, "shall", and expresses concern over a holding that does not follow that necessary interpretation. Judge Whitbeck notes on page four of his concurring opinion:

> Nowhere in the language of the statute is there a provision that expressly states that an employer, if it fails to provide the required Section 921 notice, loses the benefit of the 52-wwek limitation.

The Commission correctly repeatedly addresses in its orders what creates liability in the statute. In doing so, it distinguishes between alleged entitlement and responsibility for that entitlement. Section 921 expressly limits the Defendant's liability as follows:

> **The liability of the employer** for payment of compensation, for furnishing medical care or for payment of expenses pf the employee's last illness and burial as provided in this act **shall be limited to those benefits accruing during the period of 52 weeks after the date of injury. Thereafter, all compensation** and the cost of all medical care and expenses of the employee's last sickness and burial **shall be the liability of the fund.**

The Magistrate and other counsel in this matter have made much ado about use of the word "shall" in statutes. The intent of the legislature could not be clearer in Section 921. The Defendant's liability shall be limited. The Court has consistently recognized that the cardinal rule of statutory construction is to give effect to the intent of the legislature from the text of the statute. **Drouillard v Stroh Brewery Co**, 449 Mich 293, 536 NW2d 530 (1995).

The word "shall" is imperative and is not discretionary. **Depyper v Safeco Insurance Co of America**, 232 Mich App 433, 591 NW2d 344 (1998). The necessary application of Section 921 in this case limits the Defendant's liability to 52 weeks because of the imperative "shall" in the statute.

The Court of Appeals noted the complete absence of any qualification of the word "shall" within the statute. Judge Whitbeck noted twice in his opinion the "absolute silence" in the second and third sentences of Section 921 on the issues of shielding the Fund and imposing additional liability on the Defendant. **Bailey v Oakwood Hospital and Medical Center**, 259 Mich App 298; 674 NW2d 160 (2003) (WHITBECK, J., concurring)

Under these circumstances, the Court should clarify issues of major significance to the state's jurisprudence by correcting clear injustice, correcting legal error, and

reversing a decision that on the writings of Chief Judge Whitbeck was rendered purely pursuant to the binding application of *stare decisis*. Judge Whitbeck invites the Supreme Court to reverse **Robinson, Valencic and Bailey**. Accordingly, **Robinson, Valencic and Bailey** must be overruled.

RELIEF REQUESTED

WHEREFORE, Defendant/Appellant, Oakwood United Hospitals/Oakwood Healthcare, Inc., prays that the Court reverse the decisions of the Magistrate and Court of Appeals in this matter.

Respectfully submitted

HUMPHREY,HANNON,MORIARITY & SCHOENER, P.C.

BY:_____

Robert J. Humphrey P31540
John L. Ruedisueli P41164
Attorneys for Appellant
3201 University Drive Suite 150
Auburn Hills, MI 48326
(248) 409-9000

Dated: September 1, 2004